Filed 4/9/19 In re N.T. CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re N.T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. N.T., Defendant and Appellant.	A153563 (Napa County Super. Ct. No. JV18381)

N.T. (defendant), born in March 2000, challenges the juvenile court's order denying his motion to have certain property returned, including an iPhone 6 he used to commit an offense for which he was declared a ward of the court. He contends the court abused its discretion in denying his request for the return of his iPhone 6. Mandate, however, is the "proper means of compelling the return of property illegally seized." (*Porno, Inc. v. Municipal Court* (1973) 33 Cal.App.3d 122, 124, fn. 2.) In any event, the issue is now moot. We therefore dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

The history of this case is set forth in our prior opinion, *In re N.T.* (Feb. 6, 2019, A151384) [nonpub. opn.], of which we take judicial notice (Evid. Code, § 451). To summarize, defendant was declared a ward of the court and placed on probation with various conditions on May 17, 2017, after he admitted he committed disorderly conduct

(Pen. Code, § 647, subd. (j)(1)) by using his iPhone 6 to surreptitiously take a video of a female classmate using the toilet. He appealed from the dispositional order and challenged several probation conditions (the First Appeal). We modified one of the challenged conditions but affirmed the orders in all other respects. One of the conditions we upheld was one that prohibited defendant from possessing a smart phone.

On September 26, 2017, while the First Appeal was pending, a new juvenile wardship petition was filed alleging defendant violated his probation by possessing an iPhone 5S and using it to view pornography and send and receive sexually explicit material on Snapchat, an application that deletes communications that are sent through it. Officers confirmed the iPhone 5S contained sexually explicit videos and numerous sexually arousing pictures of females of undetermined age. Defendant admitted in a polygraph examination and subsequent interview that he had an iPhone 5S, used it to communicate with people, viewed pornography on his iPad and iPhone, and used Snapchat.

Defendant admitted his probation violation on October 2, 2017, and the juvenile court sustained the petition that same day. At disposition on October 16, 2017, the court continued defendant as a ward of the court and continued his probation.

On December 19, 2017, defendant filed a motion to strike some of the original terms of his probation and also requested the return of unspecified property that was in the possession of the Napa County Sheriff's Department. At a January 30, 2018 hearing on the motion, defense counsel clarified that defendant was seeking return of the iPhone 5S and the iPad used to commit the probation violations as well as the iPhone 6 he used to commit the underlying disorderly conduct offense. Counsel noted that all illicit material could be erased from the devices before their return.

The prosecutor argued the iPhone 6 could not be returned while the First Appeal was pending because the iPhone 6 contained evidence supporting the disorderly conduct offense. Defense counsel argued, among other things, that retention of the iPhone 6 was

unnecessary because the Napa County Sheriff's Department had performed a "cell phone dump" and had separately stored all of the evidence. Counsel also noted there was no chance the evidence on the iPhone 6 would be needed for a new jurisdictional hearing because defendant was not contesting his admission to the offense. The prosecutor responded, "[N]obody can really anticipate what's going to happen on appeal. There can be claims of [ineffective assistance of counsel] that . . . reverse an entire case. . . . While the case is on appeal, the evidence is frozen."

The juvenile court declined to modify defendant's probation. As to the property defendant was seeking, the court ordered the iPhone 5S and the iPad to be released to defendant's parents subject to a protective order prohibiting defendant from having access to them. The court denied release of the iPhone 6 "without prejudice," stating "I don't think they can get [it] back . . . while this case is on appeal." The prosecutor asked whether the parties would have to return to court after the First Appeal is resolved, "or shall we only come back if [defense] counsel doesn't agree to the protective order [prohibiting defendant from having access to the iPhone 6]?" The court responded, "We can deal with it ex parte," and defense counsel said, "We'll work it out."

DISCUSSION

Defendant contends the juvenile court abused its discretion in denying his motion for the return of his iPhone 6. The Attorney General responds that the order from which defendant purports to appeal is not an appealable order. We conclude the appeal must be dismissed.

The right to appeal is wholly statutory. (*People v. Mazurette* (2001) 24 Cal.4th 789, 792.) Welfare and Institutions Code section 800, subdivision (a) authorizes appeals from "any subsequent order . . . as from an order after judgment," but the quoted language has been held to apply "only to subsequent orders relating to the judgments and decrees theretofore made and the matters which caused them to be made." (*In re Brekke* (1965) 233 Cal.App.2d 196, 198 (*Brekke*), cited with approval in *People v. Chi Ko Wong*

(1976) 18 Cal.3d 698, 709, overruled on other grounds by *People v. Green* (1980) 27 Cal.3d 1, 33–34.) Thus, in *Brekke*, the Court of Appeal dismissed the minor's appeal from the juvenile court's order transferring him to adult court, concluding that while the transfer order was temporally subsequent to the declaration of wardship, it was unrelated to the original matter that caused the court to assume jurisdiction over the minor. (*Brekke*, at pp. 198–200.)

Courts have held that a motion to return property, like defendant's, similarly does not qualify as a "subsequent order" because it is a proceeding that is wholly separate from the underlying criminal action, i.e., one that is not directed to the criminal action that resulted in the conviction, or does not impact any rights affected by that action. (E.g., *People v. Tuttle* (1966) 242 Cal.App.2d 883, 885; *People v. Gershenhorn* (1964) 225 Cal.App.2d 122, 125.) Accordingly, it is not enough that the challenged order was "issued after the juvenile court issued a judgment in his Welfare and Institutions Code section 602 proceeding . . . ." The proper avenue for review of the court's denial of defendant's motion was a petition for a writ of mandate. (*Porno, Inc. v. Municipal Court*, *supra*, 33 Cal.App.3d at p. 124, fn. 2 ["Mandate is a proper means of compelling the return of property illegally seized"], citing *Flack v. Municipal Court* (1967) 66 Cal.2d 981, 984.)

Moreover, even if we were to construe the appeal as a petition for a writ of mandate, we would deny the petition as moot. As noted, the juvenile court stated it was denying defendant's request "without prejudice" "while this case is on appeal." We have now issued an opinion in the First Appeal, and the opinion became final on April 8, 2019. Thus, the issue is now moot. We presume the juvenile court will—if it has not done so already—revisit the issue now that the First Appeal is no longer pending.

DISPOSITION

The appeal is dismissed.

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Wiseman, J.*

WE CONCUR:

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Siggins, P. J.

_____
Petrou, J.

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* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.